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Supreme Court of the United States

ANTHONY BRADEN BRYAN,

Petitioner,

—v.—

MICHAEL MOORE, Secretary, Florida Department of Corrections,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF *AMICUS CURIAE* OF THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF PETITIONER

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CONSTITUTION

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Supreme Court of the United States

No. 99-6723

ANTHONY BRADEN BRYAN,

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BRIEF *AMICUS CURIAE* FOR THE LAW & HUMANITIES INSTITUTE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Law & Humanities Institute ("LHI") is a not-for-profit foundation concerned with the various inter-relations between law and literature. LHI believes that many complex areas of development in the American legal system can be illuminated by reference to non-legal sources that clarify and complement traditional doctrine.

LHI, in its 20 year existence, has monitored developments in the difficult and always evolving area of Eighth Amendment jurisprudence, specifically in the domain of capital punishment. LHI perceives the "cruel and unusual punishments" clause -- on its terms -- to invite continuing judicial awareness of norms of decency and dignity within the larger American society.

As the state of Florida completes its 75th year using the electric chair to dispatch those convicted of capital crimes and

sentenced to death, LHI recognizes the specific device of electrocution as particularly challenging to the American sense of decency and dignity at the turn of the millennium.

Some of the sources we cite in our Argument discuss the Florida electric chair specifically; others also address electrocution generally. LHI believes that, at its origins, people of good will -- lawyers and non-lawyers alike -- had high hopes for electrocution as an "advance" over existing and ancient methods of capital punishment.

As amicus curiae will show, however, public opinion quickly began to reflect empirical disappointment with the electric chair. Even in times when Americans could support capital punishment itself (and those times seem to run in cycles), electrocution never sustained solid support as a humane technique to complete the state's business in its most awesome role -- the legalized executioner of a human being.

Amicus LHI differs from the parties in this proceeding through its diverse use of source material regarding electrocution. LHI strongly asserts that adjudicators exercising the enormous power of life and death need to be informed of all wise and compelling discussions of the electric chair. Only then can the Supreme Court interpret under its own mandate of "evolving standards of decency" the issue raised by this case.

Amicus has obtained and filed the written consents of the parties to the filing of this brief pursuant to Rule 37(3)(a) of the rules of this Court.

SUMMARY OF ARGUMENT

The Law & Humanities Institute argues that the state of Florida violates the Eighth Amendment, as interpreted by this Court, every time it pulls the switch to release electric charges into the pinioned bodies of condemned individuals. Debate within the Florida supreme court alone indicates increasing distress among the state's judges at repetitive calls upon them to

sanction a method of death that has demonstrably breached even the most dispassionate observer's sense of decency and dignity.

Part I of the brief summarizes the history of Florida's 75-year experiment with electricity, embedding that discussion in the 110-year use of the electric chair in this country. Amicus LHI argues that -- from the origins of the electric chair -- scientists, physicians, philosophers and story-tellers have increasingly questioned the high hopes that greeted the first electrocution. Much changed almost immediately after that event, when William Kemmler's death did not produce the "clean" results people of good will anticipated. From that moment on, knowledgeable observers in many walks of life began to compare electrocution unfavorably to the dominant mode of hanging it was supposed to replace. Instead, authoritative observers -- from actual physicians attending an execution in 1898 to Justice Brennan opining in the 1985 case of Glass v. Louisiana -- have compared electrocution to outmoded and uncivilized methods of "torture," specifically to burning at the stake and drawing and quartering.

The discussion in almost all appellate cases dealing with capital punishment generally assumes that the condemned person has acted violently upon at least one innocent other or -- in the case of treason -- upon the people as a whole. Such crimes cannot and should not be removed from the judicial mind as it assesses electrocution and its effects. But all courts, and especially the Supreme Court, must contemporaneously endeavor to trace the evolving line of decent governmental behavior into the sinews and the senses of even the condemned person. Adjudication in this area necessarily involves the interpreter in the circuitry of pain and the disfigurement of violent death.

Part II argues that this Court's standard of interpreting the Eighth Amendment in capital punishment cases mandates close scrutiny of the concept of "decency," and that such an analysis directs the interpreter to the notion of human dignity. Dignity is itself a multifaceted goal that, when it comes to extinguishing a

human life through legal means, requires minimizing the victim's pain and his body's disfigurement.

Dignity also asks a good deal more of the state in planning its modes of capital punishment. Governments, when taking the lives of human beings, represent their citizens and must consequently act in a dignified manner. It is thus the dignity of the citizens of the state of Florida, as much as it is the dignity of the condemned individual, that must be respected under "evolving standards of decency." The dignity of the state cannot hide behind a method of killing whose only "virtue" is its relative invisibility, invisible as it courses through its victim but never in its disfiguring effects.

Part III argues, using a variety of judicial and academic authorities, that this case raises issues fundamental to the acceptance by the public of law's legitimacy. Electrocution as a means of capital punishment in the year 2000 is no longer tolerable as a component of Eighth Amendment jurisprudence.

In the concluding Part IV, amicus LHI asks the Court to consider as valuable source material on decency and dignity several 20th century reflections on executions by essayists and novelists. Amicus argues that, in deciding the issue now before the Court, adjudicators need feel no dissonance between their own frame of reference and that of other powerful indices of evolving norms of civilized behavior.

Fatal currents set in motion by Florida's electric chair must never explode again into the cells and sinews of a human body.

ARGUMENT

I. The Electric Chair: A Disillusioning History

It is now exactly 75 years since the electric chair was installed as the sole means of capital punishment in the State of Florida. (Craig Brandon, The Electric Chair, (1999), p. 219). On August 6, 1990, the use of the electric chair in the country more generally "celebrated its 100th Anniversary" (Id., p. 253). During the course of this long history, the Supreme Court of the United States, as well as a variety of lower courts have considered the constitutionality of the electric chair under the "cruel and unusual punishments" provision of the Eighth Amendment of the United States Constitution. At no time during that period has any court ruled that the electric chair, despite many malfunctions, violated that provision. But occasional voices in this Court (both in majority and dissenting opinions), as well as in the lower courts, have flagged the barbarity and the inappropriateness of this particular method of capital punishment. So have legal commentators. One of them, Professor Lonny L. Hoffman, puts it this way:

> Having abstained from considering the hard questions relating to electrocution for so long, courts bear the onus of re-examining the constitutionality of the century-old method. The judiciary cannot only pronounce sentence; it must also monitor how the sentence of death is carried out... It is a sobering reminder in this age of weapons of mass destruction and killing that how we exact the ultimate sanction of the law matters. Not only for the prisoner, but for ourselves as well. "The Madness of the Method," 70 Texas L. Rev. 1039, (1992), 1042.

Lawyers, law professors, and wise and eloquent commentators from the wider range of American discourse have almost continuously commented on the cruelty, if not the unusualness, of the electric chair. In one of the most striking recent statements, Justice William Brennan dissented to this Court's denial of certiorari in a case challenging the practice. Justice Brennan, joined by Justice Marshall, amassed the empirical evidence and opined that "it is difficult to imagine how such procedures constitute anything less than 'death by installments' -- a form of torture [that] would rival that of burning at the stake," Glass v. Louisiana, 471 U.S. 1080 at 1090 - 91 (1985) citing Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 476 (1947), (Burton J. dissenting).

Associations of prior barbaric forms of punishment with electrocution did not originate in the Supreme Court of the United States. The always uncertain performance of the electric chair was both predicted and subsequently chronicled from the period of the instrument's first use in the New York execution of William Kemmler in 1890. Many reasonable minds at the time earnestly hoped that the electric chair would provide a less painful, disfiguring, and extended form of capital punishment than, for example, hanging. (The Electric Chair, p. 49.) However, it quickly became clear even to these individuals that electrocution would never fulfill its humane potential. At best, the chair provided an unpredictable form of death At worst, it exposed the convicted individual to torture, extended pain, and extreme disfigurement, as the electrocution of William Kemmler itself proved. It was far from painless or instantaneous. "Some witnesses indicated that electrocution appeared to be 'far worse' than hanging, and surmised that the 'electrical experiment' would never again be used as a form of capital punishment." (Phillip R. Nugent, "Pulling the Plug on the Electric Chair: The Unconstitutionality of Electrocution," 2 William & Mary Bill Rts J. 185, 195 (1993) at p. 196.) "The New York Press stated that the 'age of burning at the stake is past; the age of burning at the

wire will pass also.'" (Russell F. Canan, "Burning at the Wire", Radelet, ed., Facing the Death Penalty (1989), p. 67.) A spokesman for the Buffalo District Attorney stated "'there is no question that unnecessary and revolting cruelty was inflicted upon the unfortunate Kemmler . . . This man, it appears, was made to suffer most horribly, and the first great experiment in this matter could hardly be termed a success." (Nugent, supra at p. 196.)

Only eight years after Kemmler's execution, a physician in New York state who had performed an autopsy on one of the many condemned individuals who now routinely were being electrocuted described the findings of his own autopsy as follows:

> "If the convict is dead, he will stay dead without the autopsy. If he is alive then the autopsy is a crime that outrages decency, a crime a thousand times more horrible then the crime for which the convict sacrifices his life... To be rendered helpless by an electric shock and then disemboweled by doctors before the body is cold is the decree of our 20th-century courts... The profession at large should protest vigorously against performing the legitimate functions of the hangman." The Electric Chair, p. 220.

Dr. O'Neill's observations not only joined those of many others who had witnessed the duration and the physical mutilation connected with the average electrocution, but his reference to drawing and quartering joins the later thought of Justice Brennan, namely that the electric chair in particular harkens back to uncivilized modes of legal life-taking. Dr. O'Neill gruesomely, but according to his own personal experience, adds the observation that death sometimes simply does not occur, no matter how many jolts of electricity are

injected into the body of the condemned. It seems to have been the function of at least an occasional doctor -- during the autopsy -- to administer a "coup de grace" to ensure the actual death of the victim.

Observers of this means of execution outside of the professions of law and medicine have raised their voice as well, representing electrocution as less a new and humane technology of death than an outgrowth of our own Anglo-American tradition and its numerous, creative, and horrifying forms of dealing death to the convicted and the unwanted.

II. "Decency" and "Dignity"

In the case of Trop v. Dulles, 356 U.S. 86, 100 - 101 (1958), this Court established a constitutional standard that a capital method of punishment must be consistent with "evolving standards of decency that mark the progress of a maturing society." The Court asserted that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." The Eighth Amendment terms "cruel and unusual," together with Trop v. Dulles, virtually require a court of final jurisdiction in capital punishment matters to look to all available sources of wisdom about the state's ultimate act, the taking of a human life. As the Court said in Trop, the "scope [is] not static" but constantly changing. A distinguished commentator on capital punishment, Hugo Adam Bedau understands the Court to be saying:

> "Cruel and unusual punishment" is... not a rigidly designated term, in the way it has been argued that names of naturally occurring species (for example "tiger") or inert natural kinds (for example, "diamond") are. The sense of "cruel and unusual punishment" has to be taken from the properties of those punitive acts and practices

> that have been judged to be morally unacceptable in a particular historic time and culture. Bedau, Death is Different (1987), p. 105.

And the United States Court of Appeals for the Ninth Circuit has very recently seen this Court to require constant scrutiny of the various methods states may try from time to time, a scrutiny that mandates the widest possible survey of social commentary and sources. See LaGrand v. Stewart, 173 F.3d 1144 (9th Cir. 1999).

The evolution of "decency" in our society, when applied to the governmental act of execution, involves first and foremost the Court's own value of "dignity". The issue, most cogently stated, becomes "Is electrocution consonant with the goal of dignity?" In answering this question, the Court must consider the dignity both of the condemned person facing the electric chair *and* the dignity of the citizens of the state of Florida, which has consciously designated electrocution as its mode of capital punishment.

This Court's emphasis on "decency"and "dignity" mandates scrutiny of the possibility of prolonged pain, extreme disfigurement, and the needless psychological and physical torture connected to known defective methods of capital punishment.

A. Electrified Pain: the Visible and the Invisible

How are we to gauge pain? As is true of all trauma, pain is exceptionally difficult to put into words; as Elaine Scarry puts it, "Ordinarily there is no language for pain... [It] (more than any other phenomenon) resists verbal objectivity." (Scarry, The Body in Pain (1985), p. 12.) It is especially important for judges to be sensitive to the pain that even the most reviled of our fellow human beings must endure through the conscious workings of the state. No one else will speak the unspeakable. No judge can

be immune from the difficult and undesirable task of achieving a form of empathy with the pain experienced even by those who may have caused extreme pain to others. But this is the price of an increasingly civilized scrutiny of our governmental practices. If the Ninth Circuit in La Grand has judged lethal gas to cause unconstitutional levels of pain, so doctors and others have observed what appears to be extreme pain, expressed through the body movements of the deliberately and forcibly muted victim of electrocution.

Law professor Deborah W. Denno, who has reported considerable medical data about electrified pain (see e.g., Denno, "Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century," 35 William & Mary L. Rev. 551 (1994)), has found the method constitutionally wanting. Thus, "the most recent research and eyewitness observations suggest that a wide range of factors associated with an electrocution, such as severe burning, boiling body fluids, asphyxiation, and cardiac arrest can cause extreme pain when unconsciousness is not instantaneous. . . [E]ven a routine electrocution can cause torture and a lingering death because of human error, a lack of experience and knowledge, or machine malfunction. . . [T]he human skull can insulate the brain from an electric current, thereby preventing the current from penetrating the brain to cause unconsciousness or to destroy nerve activity. Because the electric current stimulates each muscle to full contraction, the prisoner cannot move even when the current is momentarily turned off, 'a physiological effect that, in itself, is enormously painful and further prevents the prisoner from crying out or providing other outward signs of other massively painful effects of electrocution such as third degree burns and an enormous heating up of bodily fluids throughout the body.'" Denno, "Are Executions Constitutional?" 82 Iowa L. Rev. 319, 356 - 57 (1997), citing medical testimony (id., at 356 notes 220 - 28).

Yet, it is easy to forget -- even in a moment of judgment about the Eighth Amendment -- the temporal experience of pain endured by a convicted capital criminal. As Scarry puts it more generally, "the relative ease or difficulty with which any given phenomenon can be *verbally represented* also influences the ease or difficulty with which that phenomenon comes to be *politically represented*... But the sentient fact of physical pain is not simply somewhat less easy to express than some [other] event, somewhat less visible... but so nearly impossible to express, so flatly invisible that . . . even where it is virtually the only content in a given environment, it will be possible to describe the environment as though pain were not there." (The Body in Pain, supra, p. 12.)

In the case of electrocution, the natural propensity to ignore or to devalue someone else's pain may have helped otherwise civilized observers to tolerate it for 110 years. Even if a body twisting next to a visible rope as it chokes to death cannot be ignored, electrocution -- unlike every other means of capital punishment -- is invisible to the non-victim as it courses "cleanly" through the human body. Therefore, it is understandable that a court might be distracted from thinking of electrocution's pain and instead wish to emphasize society's rationalized termination of the life of a murderer, one who has after all inflicted pain on an innocent victim.

Invisible and apparently subcutaneous, electrical death greatly appealed to even very enlightened jurists and scientists of the late 19th century. But the earliest executions disabused these optimists of their hopes. Even at its best, the device of the electric chair finally revealed its particular form of violence. When the chair was defective, or the procedure was "botched," electricity proved to be a hideous means of death, so that many of the condemned required three, four, and sometimes five jolts of electricity, inflicting increasing burns to the skin, with fire leaping from the scalp, and the fingernails drilled through hands and other limbs in pain.

The Eighth Amendment, as interpreted by this Court, requires attention to what is usually suppressed and missing from the discourse about capital punishment -- the pain of others, the pain of the least among us. Recent forensic science has brought about the release of 79 men and women from death row since 1973 (NY Times editorial May 23, 1999), but even if most condemned people are guilty, they deserve the dignity and the decency of a process of death that minimizes the probability of pain.

Looking at the constitutional standard of evolving notions of human decency, therefore, courts must condemn electrocution on grounds connected to pain. Justice Brennan, joined by Justice Marshall in their dissent to the denial of certiorari in Glass, quoted Justices Stewart, Powell, and Stevens, to the effect that "first and foremost, the Eighth Amendment prohibits 'the unnecessary and wanton infliction of pain.'" Glass, citing Gregg v. Georgia, 428 U.S. 153, 173 (1976). Of electrocution it has been said by the writers of case studies from Florida's death row as well as experiences they observed in other states:

> Electrocution may involve excruciating pain as well as physical violence, mutilation of the body, burning of the flesh, etc. Several recent executions required considerable time. In 1985 it took an executioner in Indiana 20 minutes and five surges of electricity to kill William Vandiver, who had refused to appeal his death sentence, saying only that he wished to die in peace. Alabama's 1983 execution of John Evans necessitated the better part of an hour, numerous jolts of electricity, with an electrode on the leg exploding and being destroyed in smoke and fire. Observers described it as torturing him to death. Kent S. Miller and Betty Doris Miller, To Kill

and Be Killed: Case Studies from Florida's Death Row, (1989), pp. 57 - 58.

A mode of punishment that is incapable of providing requisite levels of dignity as to its infliction of pain must inescapably challenge evolving notions of decency, thereby rendering that mode of capital punishment archaic and constitutionally infirm.

B. Disfigurement

Co-equal with pain is a concern for disfigurement. Indeed, the move from outmoded means of execution -- such as stoning, garreting, and flaying -- had as much to do with society's desire to resist the victim's disfigurement as with the minimization of his pain. England and America, too, had consistently resisted the relatively painless device of the guillotine because of the inevitable marring of the human body involved in that technique. (See, e.g., Michael Madow, "Forbidden Spectacle: Executions, the Public, and the Press in 19th Century New York," 43 Buffalo L. Rev. 461 (1995) at 535.) But electrocution inevitably inflicts a terrible disfigurement on its victim.

The deformations and disfigurements caused by electrocution, perhaps even more so than by gas, LaGrand, supra, evoke outmoded forms of capital punishment and torture such as burning at the stake. Electrocution desecrates the human body, for when a body is electrocuted

> 2000 volts of electricity shoot through a human being and make his body leap and cringe. The condemned's eyeballs can literally pop out of the socket. The face as well as the fingers, legs and toes become hideously contorted and disfigured. It is not unusual for the prisoner to defecate and urinate during the surge of current. The

> vomiting of blood and saliva is common. The prisoner actually smolders under the force of the current, and the temperature of the brain approaches the boiling point of water. Doctors who have performed autopsies of electrocuted men report that the liver is so hot that it cannot be touched by a human hand. (Radelet, ed., Facing the Death Penalty, pp. 67 - 68.)

In 1990, the Florida electric chair malfunctioned causing six inch flames to erupt from the headpiece supplying life-depleting electricity to the body of Jesse Joseph Tafero. (Michael L. Radelet, "Post-Furman Botched Executions," http://www.essential.org./dpic/botched.html.) Throughout the decade of the 90's, Florida continued to experience a virtually inevitable series of undignified, inhumane, and indecent electrocutions. The increasingly obvious barbarity of this particular method of execution contributed to the vast reduction during this period in the number of states permitting, much less dictating electrocution as their means of capital punishment. "By the mid-1990's two thirds of all executions that had taken place since the death penalty was restored took place in only five states: Texas, Florida, Virginia, Louisiana, and Georgia... All the states in the east and west that once used electric chairs have shut them down for good." (The Electric Chair, pp. 254-255.) Yet Florida proceeded throughout the decade of the 90's to employ a means of execution whose specific features could now clearly be defined in terms of pain, torture, disfigurement, and indignity.

After the horrifying electrocution of Tafero in 1990, the Florida Department of Corrections investigated what went wrong and found that a synthetic sponge was used in the headpiece of the execution apparatus. Despite three strong dissenting opinions in the case of a subsequent condemned man on Florida's death row, opinions that detailed in the Florida Reporter the grizzly effects of the chair on Mr. Tafero's entire body, Buenoano v.

State, 565 So.2d 309, 310 - 11 (Fla. 1990), no hiatus was imposed on Florida's electrocutions. On March 25, 1997, Florida executed Pedro Medina. As was true of many electrocutions in the state over its 75 - year history, so here numerous observers attested to the hideousness of the procedure.

> "With the first jolt of electricity, blue and orange flames sparked from the mask covering Medina's face. Flames up to a foot long shot out from the right side of Medina's head for six to ten seconds." (www.essential.org/dpic/botched.html, supra.)

The pathologist who conducted the autopsy found that

> 1. The head had a "burn ring" on the crown of the head that was common in executions by judicial electrocution.
> 2. Within the "burn ring" there was a third degree burn on the crown of the head, with deposits of charred material...
> 3. There was a first degree burn of the upper front of the face and head, caused by scalding steam. (Jones v. State, 701 So2d 76 (Fla. 1997), Shaw, J., dissenting, pp. 86 - 87.)

A society that tolerates such disfigurement cannot be described as civilized.

III. The Legitimacy of Law and the Barbarity of Electrocution

The legitimacy of law depends, in part, on the widely shared sense that how legal officials act and how they do what they do is both legally appropriate and fair. (See Tom Tyler, Why People Obey the Law (1990).) Tyler suggests that "People

are more responsive to normative judgments and appeals than is typically recognized by legal authorities" (p. 178). While Tyler did not study executions and people's reactions to them, his findings have clear and important implications for the practice of electrocution.

However full of optimism was the early thinking about electrocution as a technology for taking life, today it is outmoded. It is no longer the technology best able to minimize the risk that execution will impose unnecessary pain or disfigurement and thus be incompatible with evolving standards of decency. As the Supreme Court put it, in order to be constitutional, methods of execution must not impose "something more than the mere extinguishment of life." (In re Kemmler, 136 U.S. 436 (1890) at p. 447). Because electrocution today involves more than "the mere extinguishment of life" it is no longer able to satisfy the normative basis of legal legitimacy.

"When our government takes the life of one of its citizens, constitutional doctrine correctly commits it to do so in as humane a fashion as is possible. Electrocution is no longer a humane method of execution. From hanging to electrocution, from electrocution to lethal gas, from electricity and gas to lethal injection, execution has moved, though not uniformly, from one technology to another." (Allen Huang, "Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit's Misapplication of the Cruel and Unusual Clause of the Eighth Amendment," 74 Oregon L. Rev. 995 (1995).)

The development of technology regularly renders previously acceptable methods of execution barbaric, or simply archaic. Thus, as one judge recently said about death by electrocution, "Execution by electrocution is a spectacle whose time has passed -- like the guillotine or public stoning or burning at the stake....Florida's electric chair, by its own track record, has proven to be a dinosaur more befitting the laboratory of Baron Frankenstein than the death chamber of Florida State Prison." (Jones v. State, supra, Shaw. J., dissenting, p. 87). As a Federal

District Court in Arkansas recently put it in upholding the constitutionality of lethal injection, "There is general agreement that lethal injection is at present the most humane type of execution available and is far preferable to the sometimes barbaric means employed in the past." (Hill v. Lockhart, 791 F. Supp. 1388, 1394 (1992).) As Judge Anstead stated in adjudicating the case below on whose authority the present Petitioner stands ready for electrocution, "[j]ust as electrocution may have been originally evaluated in comparison with hanging, we know today that the overwhelming majority of death penalty jurisdictions have long since rejected use of the electric chair and have turned to lethal injection as a more humane punishment." (Provenzano v. Moore, No. 95,973 (Sup. Ct. Fla, 1999), Anstead, J., dissenting, pp. 70-71.)

Where the courts fail to see in the Eighth Amendment the requirement that the technology used by the state to take life must keep pace with the ability to execute in the least painful and disfiguring ways possible, they threaten to undermine one pillar of legal legitimacy. Whereas at other times and in other countries the technologies of execution deployed by the government were valued precisely because of their gruesome effects on the body of the condemned, today under the guidance of the Eighth Amendment "executions. . . [have been] progressively stripped of their ritualistic and religious aspects . . . [A]s Americans developed a keen dread of physical pain, medical professionals teamed up with...engineers to devise a purportedly 'painless' method of administering the death penalty. . . .The condemned man. . . . had now become simply the object of medico-bureaucratic technique -- his body read closely for signs of pain. . . .The overriding aim of the state functionaries charged with conducting executions nowadays is to 'get the man dead' as quickly, uneventfully, impersonally, and painlessly as nature and science permit." (Michael Madow, "Forbidden Spectacle", 43 Buffalo L. Rev. supra, p. 469.)

Succeeding in this aim is crucial in terms of its impact on the legitimacy of law. At least one scholar argues that the requirement that execution be painless "follows a common pattern in which the humanistic, sentimentalized body in pain emerges as a site of empathy and identification" in the 19th and 20th centuries. Alan Hyde, Bodies of Law (1997), p. 192. Sentimentalizing the body of the condemned establishes, Hyde rightly notes, a bridge between the criminal and the public. The criminal, no matter how horrific his deeds, is like us in his body's "amenability to feeling." (Id., p. 193.) The concern that punishment not inflict physical pain or excessive disfigurement explains the fact that "electrocution, gas chambers, lethal injections are each introduced with tremendous fanfare as a painless form of death, until each is revealed to promote its own kind of suffering on the way to death." (Id.)

When fulfilling their responsibility to adjudicate capital punishment disputes under the Eighth Amendment, this Court has recognized its responsibility to apply the norms of contemporary American society to "evolving standards of decency." Understanding that, in such cases, "legal interpretation takes place in a field of pain and death" (Robert Cover, "Violence and the Word," 95 Yale L. J. 1601 (1986)), members of this Court have found common ground in linking Eighth Amendment adjudication to an ability to weigh one kind of death against another.

This commonality in Eighth Amendment norms was put vividly on display in Justice Scalia's response to Justice Blackmun's dissent from a denial of certiorari in Callins v Collins, 510 U.S. 1141 (1994). In that dissent, Justice Blackmun announced that he no longer would "tinker with the machinery of death" (Id. at p. 1145) and that he would, as a result, vote against the death penalty in all subsequent cases. Justice Scalia agreed that Justice Blackmun described "with poignancy the death of a convicted murderer by lethal injection" (Id., at p. 1142) but opined that compared with "the murders that regularly

come before us -- the murder of a man ripped by a bullet suddenly and unexpectedly, with no opportunity to prepare himself and his affairs, and left to bleed to death on the floor of a tavern, " death by lethal injection "looks pretty desirable next to that." (Id.) "How enviable," Justice Scalia continued, "a quiet death by lethal injection compared with that!" (Id. at p. 1143.)

Death by electrocution in the state of Florida is more comparable to violent, unpredictable murder than to any "quiet death." As Judge Shaw observed, "The color photos of Davis depict a man who -- for all appearances -- was brutally tortured to death by the citizens of Florida... Each botched execution cast(s) the entire criminal justice system of this state -- including the courts -- in ignominy." (Provenzano, supra, Shaw, J. , dissenting, p. 65.) Execution, guided by the restraining hand of law, should be rational, purposive, and proportional; the violence to which it responds is, in contrast, often irrational, anomic, excessive. In the face of scientific "progress" the Eighth Amendment can no longer condone the continuing use of archaic technologies in executions and still retain the dignity and respect of citizens.

IV. When We are Made to See the Invisible: Stories About Execution and Electrocution

As this brief discussed in Part II, supra, electricity provides a deceptively invisible force of death. The current flows under the condemned person's flesh. Comforting to even the least retributive of onlookers, subcutaneous annihilation conceals more than it reveals. Thus, even though so many "botches" finally expose the hideous effects of the electric chair on the human body, there remains a haven of invisibility that protects the onlooker from the full experience of another's violent death. Added to this is the faulty assumption that pain is not occurring because it, too, lies beneath the supposedly unconscious distortions of the electrified brain and body.

Where appearances deceive, story-tellers reveal. Just as the "fictions of the law" permit legal resolution to occur in many cases, so fiction about the law helps adjudicators to fathom the phrase "cruel and unusual punishment" -- even where positivistic and empirical experience provides an unacceptable if quite narrow escape hatch from reality.

A. American Novelists on Electrocution

On March 30, 1908 New York State electrocuted Chester Gillette for murdering Grace Brown, his pregnant girl-friend. The Electric Chair, p. 216. Some years later, the great American novelist Theodore Dreiser translated the story of Gillette and Brown into one of our century's classics, An American Tragedy (1925). Dreiser's character Clyde Griffiths, a social climber modeled on Gillette, dies in the electric chair, which is depicted three times in the novel doing its lightbulb - dimming, dreadful, inhuman work. Dreiser set in motion a century-long tradition in American letters of bringing readers face to face with electrical death.

Richard Wright, in his 1940 novel Native Son, also depicts a full capital criminal proceeding that ends with electrocution. The state is Illinois, the charge is murder, and the accused is Bigger Thomas. Bigger, who is black, has killed a white woman. It is quite unclear that he has acted with pre-meditation.

Yet the grand jury indicts Bigger for capital murder. If convicted and sentenced to the extreme penalty under the charge, Bigger will be electrocuted. As he leaves the court house after being indicted,

> A huge throng of people covered the pavement. The wind blew hard. Out of the shrill pitch of shouts and screams he caught a few distinct words:

". . . turn 'im loose . . . ."
". . . give 'im what he gave that girl . . . ."
". . . let us take care of 'im. . . ."
". . . burn that black ape. . . ." (Wright, Native Son, p. 309)

Bigger, who is represented passionately if perhaps injudiciously by the lawyer Max, is convicted and doomed to electrocution. Richard Wright spares his reader too much detail relating to Bigger's execution, but the means of punishment decidedly interweaves with the larger subject of injustice in the novel.

Three decades later E. L. Doctorow described what the public, and even many experts, always wanted to believe about electrocutions. In his novel, The Book of Daniel, Doctorow points to the misconception that "it's very painless, it's very fast and it doesn't hurt." The Book of Daniel (1971), p. 243. However, Doctorow later goes on to give what proved to be the more accurate description, that electrocution is not painless, and neither is it fast, and neither will the condemned necessarily be saved from repetitive attempts, because often the first jolts simply do not suffice:

> The Warden was highly agitated... The executioner went back behind the wall, and again received a signal and again turned on the current. Later he said that the first "dose" had not been enough to kill..." Id, p. 315.

Like Dreiser, Doctorow was imaginatively recreating an actual execution. One of Dreiser's convicts needed three jolts, separated over 90 seconds. An American Tragedy, p. 773. In the case represented by Doctorow, it took five separate jolts of electricity to kill the convict.

Doctorow's depiction of electrocution gains particular force because the narrator of The Book of Daniel is the son of not one, but two condemned criminals. This perspective humanizes and personalizes the fate even of Julius and Ethel Rosenberg, whom the federal courts had convicted of espionage and sentenced to die in New York's electric chair.

The boy recounts his parents' executions:

> My father's hands were raised, and separated, and his arms strapped at the wrists to the arms of the chair. The arms of the electric chair are wood. The frame is wood, although a metal brace rises from the back of the chair and the chair is bolted to the concrete floor with metal braces. His ankles were strapped to the chair. The chair straps are leather. A strap was tied across his lap, another across his chest, and another, like a philactery, around his head. A guard gently removed his eyeglasses, folded them and put them aside. A guard came over, dipped his fingers into a jar, and with a circular motion rubbed an adhesive and conduction paste on the shaved place on my father's head, and then kneeled down and did the same for the place on his cap that had been shaved. Then the electrodes were fixed in place.
>
> Electricity flows in circuits. If the circuit is open or incomplete, electricity cannot flow. In electrocution the circuit is closed or completed by the human body. My father's lips were sucked up between his teeth as the hood came down over his face, every last tremor of his energy gathered in supreme effort not to cry out. The hood is black leather and is offered in respect for

the right to privacy at the moment of death. However, it is also possible that the hood is placed on the head to spare the witnesses the effect to the musculature and coloration of the face, and the effect to the organs of the face, the tongue, the eyes, of two thousand five hundred volts of electricity. My father's hands gripped the wooden chair-arms till it seemed they could squeeze them to sawdust. The chair would kill him but at this moment it was his only support. The executioner took his place behind a protective wall in a kind of cove. On the wall in this cove was a large handled forklike switch. The switch is thrown from an up position to a down position. The executioner looked through a glass panel, and observed the warden observing my father. Waiting a moment too long the warden turned to the glass panel and nodded. The executioner threw the switch. My father smashed into his straps as if hit by a train. He snapped back and forth, cracking like a whip. The leather straps groaned and creaked. Smoke rose from my father's head. A hideous smell compounded of burning flesh, excrement and urine filled the death chamber. Most of the witnesses had turned away. A pool of urine collected on the cement floor under the chair.

When the current was turned off, my father's rigid body suddenly slunk in the chair, and it perhaps occurred to the witnesses that what they had taken for the shuddering spasming movements of his life for God knows how many seconds was instead a portrait of electric current,

> normally invisible, moving through a field of resistance. (Id., pp. 313-14.)

Everything real about electrocution -- including its violence and also its deceptive invisibility -- emerges from this fictionalized account, which continues with the boy's description of the electrocution of his mother:

> My mother turned her back to the chair, disdaining any helping hand. She hugged the matron who had guarded her alone in the woman's death cell block for two years. They had become dear friends. The matron wept and ran out of the chamber. My mother, still with her peculiar smile, sat down in the electric chair and observed the strapping in of herself like a passenger in a plane getting ready for a journey. When the hood went over her eyes they were open. When the switch was thrown she went into the same buzzing spluttering arc dance. The current was turned off. The doctor came over to the slumped body and listened for a heartbeat with his stethoscope. He expressed consternation. The electrocutioner came out of his cove and they conferred. The warden was highly agitated. The three reporters communicated in urgent whispers. The executioner went back behind the wall, and again received a signal, and again turned on the current. Later he said the first "dose" had not been enough to kill my mother Rochelle Isaacson. (Id., pp. 314-15.)

This narrative defamiliarizes an assessment of electrocution by placing the account in the mouth of one who has

been orphaned by his own government. Yet Daniel's uncompromisingly accurate account of his parents' deaths does not impose blame on anyone. The guards are gentle, the warden and the doctors seem concerned about the way the electric chair is functioning.

In Doctorow's depiction, it is as though the means of legalized death had progressed beyond the control of any human agent. (And had not Dreiser seen the "death house" itself as "one of those crass erections and maintenances of human insensitiveness and stupidity principally for which no one primarily was really responsible?" (An American Tragedy, p. 758.)

This Court, however, with such descriptions legitimately on the record, cannot delegate or defer responsibility. Thankfully, as the century of American literary interest in electrocution wanes, this Court has the opportunity to recapture civilized control over a mechanism that has run amok.

B. Kafka and Camus on the Essence of Execution

Like the Americans, but even earlier, Europe's writers perceived the mechanisms of legalistic death to have overtaken the common humanity of executioner and executed alike. In 1914, Franz Kafka wrote his classic story, In the Penal Colony, a graphic description of the effects of capital punishment on the body of the condemned individual. Almost a quarter-century after New York's first electrocution, and ten years prior to Florida's initiation into electric death, Kafka was describing an eerily similar death, but without the shield of electricity's subcutaneous deviousness:

> "It's a remarkable piece of apparatus," said the officer to the explorer [who] seemed to have accepted merely out of politeness the Commandant's invitation to witness the execution of a soldier condemned to death for

> disobedience and insulting behavior to a superior. Nor did the colony itself betray much interest in this execution. . . . [T]here was no one present except the officer, the explorer, the condemned man, who was a stupid-looking, wide-mouthed creature with bewildered hair and face, and the soldier who held the heavy chain controlling the small chains locked on the prisoner's ankles, wrists and neck, chains which were themselves attached to each other by communicating links.

Kafka's description of the machinery of death continues its uncanny evocation of both the process of strapping someone to the electric chair and of electricity itself -- but it is electricity rendered visible. The "apparatus" -- as shamefully flawed as Florida's chair -- runs on "an electric battery". While Kafka declines specifically to represent an electric chair, the following account, virtually from start to finish, provides a ruthlessly honest foreshadowing of "cruel and unusual" electrocutions:

> "Needles are set in like the teeth of a harrow and the whole thing works something like a harrow, although its action is limited to one place. . . . On the Bed here the condemned man is laid -- . . . One of the cog wheels in the Designer is badly worn; it creaks a lot when it's working; you can hardly hear yourself speak; spare parts, unfortunately, are difficult to get here. . . . On this cotton wool the condemned man is laid, face down, quite naked, of course; here are straps for the hands, here for the feet, and here for the neck to bind him fast. Here . . . is this little gag of felt, which can be easily regulated to go straight into his mouth. It is meant to keep him from screaming and biting his tongue. Of course the man is forced to take the felt into his mouth, or otherwise his neck would be broken by the strap. . . . As soon as the man is strapped down, the bed is set in motion. It quivers

> in minute, very rapid vibrations, both from side to side and up and down. . . . The movements are all precisely calculated."

At the moment of death, the needles puncture the condemned person's flesh. Although "it was working so silently, the machine simply escaped one's attention," the "badly worn" parts of the instrument malfunction and finally call attention to what would otherwise seem tolerable. Eerily evoking Florida's electric chair, the always prophetic Kafka recounts the horrifying end of the prisoner's life:

> . . . [T]he bed was not turning the body over but only bringing it up quivering against the needles. The explorer wanted to do something, if possible, to bring the whole machine to a standstill, for this was no exquisite torture such as the officer desired, this was plain murder. . . . [T]he harrow rose with the body on it and moved to the side. . . . Blood was flowing in a hundred streams, not mingled with water, the water jets too had failed to function. And now the last action failed to fulfill itself. . . .

Kafka and other writers refuse to abstract the condemned person from the pre-ordained death that works upon him. Story-tellers also decline to preserve the shadows that often fall on capital punishment. So Albert Camus, in "Reflections on the Guillotine" (1957), refuses to let "our condemned criminals die by rote in the name of a theory in which their executioners no longer believe." He goes on:

> When the Nazis staged public executions of hostages in Poland, they first gagged their prisoners with rags soaked in plaster so they

> could not cry out some final word of liberty or rebellion. It may seem an effrontery to compare the fate of these innocent victims with that of our condemned criminals, but apart from the fact that it is not only criminals who are guillotined in France, the method is the same: we gag our guilty with a stuffing of words, though we cannot justly affirm the legitimacy of their punishment unless we have first considered its reality. Instead of saying, as we always have, that the death penalty is first of all a necessity, and afterwards that it is not advisable to talk about it, we should first speak of what the death penalty really is, and only then decide if, <u>being what it is</u>, it is necessary. (Emphasis in original.)

Electrocution -- <u>"being what it is"</u> -- will not survive as a means of execution one second beyond considered reflection on its real nature. So, a generation after Camus's essay, France in 1981 did away with the guillotine. That decision, and France's abolition of all means of capital punishment, were affirmed by their high constitutional court in 1985, relying in part on Protocol 6 of the European Convention on Human Rights. Similarly, New York and Illinois long ago rejected the electric chair.

But this Court finds itself still in the business of micro-managing the electrical instrumentality of death. In the name of the dignity of the condemned men and women on Florida's death row, in the name of the dignity of the citizens of the states that still use electrocution, we beg the Court to end this barbarism.

CONCLUSION

The Eighth Amendment's prohibition upon "cruel and unusual punishments," as interpreted by this Court and applied to the best current wisdom about electrocution, mandates the finding that Florida's electric chair is an unconstitutionally undignified means of capital punishment.

Respectfully submitted,

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